tory classification. It finds an application when some questions auxiliary to the trial, and preliminary to the substantive matter of the suit arises and is addressed to the court.[1] In such cases the oath of the party is received;[2] as his affidavit of his inability to attend trial, or of the materiality or diligent search made for a witness, or a paper. So in numerous similar cases. So if a party has lost a deed, or other material evidence, *out of his own custody*, and he can lay a *foundation for his own oath*, by showing aliunde that such document existed, he will be allowed to testify as to the circumstances and fact of the loss.[3]

RECENT AMERICAN DECISIONS.

In the Supreme Court of Pennsylvania, 1859.

PENNSYLVANIA RAILROAD COMPANY *vs.* ZEBE AND WIFE.[4]

1. It is necessary that each point submitted to the court, if relevant and material to the issue, be substantially answered in the relation in which it was put. It is not quite enough that an answer may be deduced from observations in other connections and relations to other facts.

2. The law implies in the contract of carrying passengers by railroad companies, that they shall provide a safe and sufficient road and cars, competent and careful

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[1] 1 Peters, 596, 597; Forbes *vs.* Wade, 1 Wm. Bla. R, 532; 2 Starkie Evid. 580, note 21, Metcalf's ed.; Vandu *vs.* Wilkens, 5 Denio, 65.

[2] Parties and persons interested generally are competent to lay a foundation for secondary evidence. Jugan *vs.* Toulmin, 9 Ala. 662; 3 Phillips Ev., C. & Hill's Notes, 128–9; ante, § 14, 15, notes; Vandu *vs.* Williams, 5 Denio, 65.

[3] C. & Hill's notes to 1 Phillips' Evid. 452 and 69, n. 122; 1 Greenleaf's Evid. § 558, 549; Riggs *vs.* Taylor, 9 Wheaton, 486; Taunton Bank *vs.* Richardson, 5 Pick. 436; Page *vs.* Page, 15 Pick. 368—375; Chamberlain *vs.* Gorham, 20 Johns. 144; contra, Coleman *vs.* Wolcott, 4 Day, 388; See V. *vs.* W., 5 Denio, 65. So a female in prosecution for bastardy, may testify to acts within her own exclusive knowledge. Devine *vs.* Stimpson, 2 Mass. 441; Mariner *vs.* Dyer, 2 Greenlf. 272; 3 N. H. 135; State *vs.* Coatney, 8 Yerg. 210; Judson *vs.* Blanchard, 4 Conn. 557.

[4] We are indebted to the Pittsburgh *Legal Journal*, for this interesting and useful case. It will also be found in 9 Casey, 318, when published.—Eds. A. Law Reg.

conductors and hands, and safe and convenient means of egress and regress from the line of their road. There must be no negligence on their part. There is also on the part of the passenger an implied assent to all the company's reasonable rules and regulations for entering, occupying and *leaving their cars*, and if injury befall him by reason of his disregard of regulations which are necessary to the conduct of the business, the company are not liable in damages, even though the negligence of their servants concurred with his own negligence in causing the mischief. Sullivan *vs.* the Philadelphia and Reading Railroad Company, 6 Casey, 234, affirmed.

3. When a passenger leaves the cars otherwise than by a safe and convenient platform provided for the purpose, and death or injury results therefrom, there must be proof of some justifying necessity for his doing so, to excuse him from negligence and the consequences of it. A voluntary disregard of regulations provided for his safe exit by the platform, is a disregard of his obligations to the company, and leaves them free from liability for injuries consequent upon his act.

4. It is not negligence on the part of the company that they do not by force or barriers prevent parties from leaving the cars at the wrong side. Passengers are presumed to act reasonably in all given contingencies.

5. The damages to which parents are entitled for producing the death of their son, under the Act of 26th April, 1855, are to be estimated by the pecuniary value to them of his services during his minority, together with expense of care and attention to the deceased arising out of the injury, funeral expenses, and medical services, if any. This excludes damages for the suffering of the deceased, which was personal to himself and did not survive, as well as for solace, which is incapable of appreciation so as to be compensated. This is the rule where the death was produced by negligence, unaccompanied by wantonness, violence or gross negligence evincive of moral turpitude. In such cases merely compensatory damages may be exceeded. As to the rule of damages, Blake *vs.* Midland Railway Company, 15 Eng. Law and Eq. Rep. 437, approved. Pennsylvania Railroad Company *vs.* Kelly, 7 Casey, 372, affirmed. Pennsylvania Railroad Company *vs.* McCloskey's Adm'rs, 11 Harris, 526, explained.

Error to the Common Pleas of Westmoreland county.

Stokes and *Clarke*, for plaintiffs in error.

Cowan, for defendant in error.

A full statement of this case is given in the opinion of the court, which was delivered at Harrisburg, May 4, 1859, by

THOMPSON, J.—This was an action brought by the defendants in error, and plaintiffs below, against the Railroad Company, for negligently causing the death of their son Peter, whom, with his father,

they had conveyed in their cars from Irwin's station, in Westmoreland county, to Brinton's station, in Allegheny county, where he was killed on the track of the company's road, by being run over by the train going east. The gravamen of the charge in the plaintiff's narr is, that "the company did not use due care, diligence, and skill, in allowing the said Peter Zebe time and opportunity to get off and away from the said cars, when they arrived at Brinton's station; but on the contrary, immediately on the arrival at the said station, and before the said Peter had time to get away from the said cars, the said company carelessly and negligently caused an engine or locomotive to be run alongside of the said cars which the said Peter was attempting to leave, so that the said engine or locomotive caught the said Peter," and passing over him, he was killed.

The case involved questions of negligence on the part of the company, as to proper conveniences for the exit of passengers from the train, and also on the part of the plaintiff and the deceased in the act of leaving the cars; and also whether the accident occurred before or after the relation of carrier and passenger had ceased or not.

There seems to have been no controversy about two facts in the case: 1st, that the company had a convenient platform at the station for passengers to leave the cars upon going west; second, that the deceased and his father, instead of leaving the cars by passing on to the platform, left it on the other side, which brought them, immediately on reaching the ground, on the other or southern track of the road, where the boy was killed.

The plaintiffs in error complain that several points put by them, calculated and intended to present their views on the question of their liability were not sufficiently answered by the court, so as to give the advantage and benefit which they claim the law would give them under the facts in the case. The first and second assignment of error is that the court did not distinctly and explicitly answer their first point.

It cannot be denied, after the many decisions upon the question, that an omission or refusal to answer a point put by a party, relevant and material to the issue, is error. 1 S. & R. 449; 2 ib. 298; 6 W. & S. 58; 3 Pa. 318; and in *Hood* vs. *Hood et al.*,

decided at this term, wherein the doctrine is elaborately examined. The law of the courts requires points put to be substantially answered, 3 Barr, 244, provided always that they are relevant, and not unconnected with the facts in the case. 12 Harris, 72. There have been many cases in which answers have been condemned for want of sufficient perspicuity or conciseness; and this shows the importance of preserving the rule that requires of the judge full and substantial answers to the points. In fact, the importance of the rule cannot be over-estimated, when we regard our short and simple pleading, which rarely brings the law of the case on the record. The only method in most cases a party has left to bring before the court, and from thence to this court for review, a proposition of law, is by presenting it as a point to be charged upon; and when clearly responded to, it greatly aids the jury in coming to conclusions in the case, or if distinctly negatived, the party has no trouble in having it reviewed. It is, therefore, necessary that the point, if relevant, be substantially answered; otherwise it will be error. The qualification of the rule to relevancy excludes, of course, abstract propositions, or such as, if answered as prayed for, would not have benefited the party.

In looking into the testimony in the present case, we think there was sufficient evidence to authorize the defendants to ask for instructions on the effect of it as regards the act of the plaintiff and the deceased in leaving the cars and placing themselves on the south track of the road. If they did voluntarily and negligently place themselves there, when there was a safe place of exit, and the full opportunity to make it, surely the defendants would not be liable, as common carriers, if instead of leaving by the usual mode of stepping on the platform, they negligently and voluntarily placed themselves on the other track. This was the law of the plaintiffs' point. It is true it was faulty in the assumption of the facts of which it was predicated. But as to this, no objection was made by the court, and a distinct answer was not refused for this reason. Nor could it well have been for such a reason, as it was capable of as distinct an answer on the law, giving at the same time the facts to the jury, as if it had been hypothetical in form. It should have been as distinctly answered, if answered at all, as if put hypothetically. But it

was not, and we do not find it sufficiently affirmed in relation to the facts on which it was based in any part of the charge. True, it might be deduced from observations in other connections and relations to other facts. But this is not quite enough. It ought to have been answered in the relation in which it was put, somewhere. The party was entitled to this. The jury could not, without much greater skill in construing language than generally falls to their lot, have told whether the point was affirmed or negatived. The point asserted immunity to the company, if the plaintiff and his son voluntarily placed themselves on the other track, unless in case of gross negligence on the part of the company. The answer, instead of affirming this, if the facts were true, treated of the duty of the company to convey safely and to provide a safe mode of exit from the cars, and added, "if they left the train in the usual way, and were properly regardful of their own safety, and did everything that their own duty required of them, and in thus leaving the train and before they found a place of safety, they were injured by the negligence of the company, then we think, that passengers in that condition, although separated from the train, would have a right to recover for such negligence. This is not the case of a stranger, unconnected with the train, placing himself voluntarily on the track." This was clearly an insufficient answer; in fact, in addition to the just complaint of insufficiency, it introduced an element which it is difficult to tell the effect of in such a case, and that was in leaving it to be inferred that there was no place of safety provided for leaving the cars; for the court say, "if they did everything that duty required of them in thus leaving the train, and before they found a *place of safety*," they were injured by the negligence of the company, a recovery might be had. From this language a jury might have inferred, and perhaps did, that acting as carefully as they could, there was no place of safety provided for leaving the cars. An intimation like this, although not intended, might have a very mischievous effect. This assignment of error we think is sustained.

2. The second, third and fourth assignment, like the first, is to the insufficiency of the answer to defendants' second point. This point asserted the principle that if the accident occurred after the

plaintiff and deceased had left the cars, the liability of common carriers was ended, and having been killed after this, the action could not be sustained, unless the death was the result of gross negligence or wanton injury. There was sufficient testimony in the case to justify the defendants in making the point, and the court should have given a distinct response to it, although like the last one, it was faulty in form. Notwithstanding this, the court essayed an answer by saying, "this point is answered in our answer to the first point of the defendant as above." How answered—affirmatively or negatively—we cannot say; and we think a jury could not have derived much instruction from it. As we have already said, the party was entitled, either directly in answer to this point, or in the body of the charge, to a distinct response to the proposition. The gravamen of the complaint was against the defendants as common carriers, and as such they were counted against. If this relation had ended when the accident occurred, the plaintiffs could not have recovered, and the evidence shows this to have been a debatable point in the case. A very different rule of responsibility exists where such an accident occurs during the continuance of the relation of common carriers, and after it has entirely ended, and it was important that the jury should have been instructed clearly as to this, so that they might not disregard the distinction upon the idea that the company were answerable at all events, under the evidence, and that the objection was merely technical. Special care is the duty of the court in all cases where there is much to excite sympathy and lead away the judgment from the application of well settled principles of law. Adherence to these principles under all circumstances, is the only security we can have. A disregard of them is an injury to the people, by rendering less secure the safeguards of the law upon which all must rely in the hour of trouble. We think the answer is insufficient.

The fifth, sixth, seventh, eighth and tenth assignments of error may be considered together. In their third and fourth points, the plaintiffs in error prayed the court to charge, that as common carriers they were only bound to provide for the safe transportation of passengers, and for their safe egress from the line of the road, and

if in this instance they had done so, and if the plaintiff and the deceased did not avail themselves of the mode of exit provided, but left at an improper time, or by an improper way, the protection of the company; ceased and if the accident occurred in consequence of this, it was the result of the risk voluntarily assumed by them, and being guilty of negligence themselves, they cannot recover.

In response to these prayers for instructions, the court very properly left the fact to the determination of the jury, whether the company had provided a safe means of transportation and the necessary platform accommodations for the safe exit or discharge of passengers, adding "if so, then the company had done all that could be required of them, so far as the passenger train was concerned." This was all very right, but following this instruction, the court submitted another inquiry to the jury, which it seems to me was inconsistent with the clear idea thus expressed, and that was, whether the plaintiff and the deceased had "an equal right to get off the cars on the one side or the other, or was it their duty in view of all the circumstances to get off on the platform." And again, "if the jury believe they had a right to get off on that side," the opposite to the platform, and they violated no duty in doing so, then no carelessness could be attributed to them.

The law implies in the contract of conveying passengers by railroad companies, that they shall provide a safe and sufficient road and cars, competent and careful conductors and hands, and safe and convenient means of egress and regress from the line of their road. There must be no negligence on their part. There is also on the part of the passenger an "implied contract that he will and does assent to all the company's reasonable rules and regulations for entering, occupying, and *leaving their cars*, and if injury befall him by reason of his disregard of regulations which are necessary to the conducting of the business, the company are not liable in damages, even though the negligence of their servants concurred with his own negligence in causing the mischief." *Sullivan* vs. *the Philadelphia and Reading R. R. Co.*, 6 Casey, 234, per WOODWARD, J. Here are reciprocal duties defined; resting upon principles most reasonable, and of the clearest justice, and nothing but special circum-

stances, or the most pressing exigencies which are now foreseen, could justify a departure from them. Nothing of the kind marked the case in hand. But the court submitted the question to the jury whether the parties in this case had not a right to leave the cars, either by the safe means provided by the company, or by a way not provided. The abstract question of their right to do so, is one thing, and need not be disputed, but the liability of the company by reason of their doing so is quite another thing. The regulation of the company for leaving the cars by the platform was apparent from its existence, and having been placed there and used for the purpose, this was the usual egress from the train. Without proof of any necessity, coupled with the proposition of their right to leave the cars at either side, the jury were by the instructions of the court allowed to find on the opposite of the principle laid down in the case of *Sullivan* vs. *the Philadelphia and Reading R. R. Co.*, which declares that passengers are bound to conform to the regulations of the company on "entering, occupying and leaving the cars." The duty being fixed by the relation of the parties to each other, the contract must be performed by both.

A departure by either could be justified only by a paramount necessity. The question, then, for the jury should have been, first, as to the performance of the duty by the company in providing safe cars, and safe means of egress from them, and secondly if this were so, was it the fault of the company that the injury occurred, and to establish this, more was necessary to be proved than that the plaintiff and the injured son voluntarily chose to depart from the cars by an unusual way. There should have been proof of some existing necessity for doing so, to excuse them from negligence, and the consequences of it. Then the question might have been left to the jury as to the propriety of their violating the regulations of the company. A voluntary disregard of regulations provided for their safe exit by the platform, was a disregard of their obligations to the company, and if this were so, the plaintiffs ought not to recover. We hold, on these principles, that the company's liability could not be fixed for the injury consequent on a choice of the passenger in disregard of the provisions made by them for his safety and convenience. It

was, we think, error in the court, to submit the question of the right of the parties to leave the cars at either side, in absence of the proof of a justifying necessity in doing so. It was not negligence on the part of the company that they did not, by force or barriers, prevent the parties from leaving at the wrong side. People are not to be treated like cattle; they are presumed to act reasonably in all given contingeneies, and the company had no reason to expect anything else in this case. There was error in this portion of the charge.

The eleventh assignment of error regards the question of damages. The court instructed the jury on this subject, by saying, "if the jury found for the plaintiff, the question is one for the jury entirely. There was no prayer for instructions, yet this will not prevent a party, dissatisfied with the charge, from having it reviewed, and errors corrected if they exist in the charge as given. It is obvious that this general and unrestricted reference of the question of damages, to the jury, gave them the fullest latitude of construction in assessing them. It left them to base that assessment upon such standard as each juror might set up for himself or any common one that might happen to suit the feelings, tastes, or judgment of all in the particular case, never again, perhaps, to be the rule in any future case, however similar in circumstances. Rights should be better defined. And although from the inherent difficulty in estimating the value of life, when called upon to compensate for its loss, we cannot lay down what may properly be called rules to guide in making the estimate, yet it is our duty to announce such principles of compensation as we think the legislature intended by the act in question, that there may be some approximation to uniformity of results in such cases.

The act of the 15th of April, 1851, provides "that whenever death shall be occasioned by unlawful violence, or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of such deceased, or, if there be no widow, the personal representatives may maintain an action for and recover damages for the death thus occasioned." The act of the 26th of April, 1855, changed the law, so far as the personal representatives were concerned, and conferred the right of recovery only upon

parents for the loss of children, and upon children for the loss of parents, and reciprocally upon husband and wife. These acts confer a new right unknown to the common law. It existed in the civil law, and was an institution of the old Saxon code. So too, it is to be found in the Scotish law under the head of "Assythements for homicide." But as the compensation under all these laws rested upon very precise regulations generally, peculiarly applicable to the times, circumstances, estates and conditions of the deceased and the parties entitled, we derive no lights from them.

In 1846, the statute of 9 and 10 Victoria, cap. 93 was passed in England, providing for the recovery of damages "whensoever the death of a person shall be caused by wrongful act, neglect or default" against the party occasioning the same. The damages, it has been held, are for the *death* of the party, as it is with us. Under this statute, providing for compensation for the same thing as does ours, namely, the death of the decedent, we have one case which turns on the subject of the rule of damages. It is the case of *Blake* vs. *Midland Railway Co.*, 15 Eng. L. & Eq. Rep. 437. The case had been tried before Baron Parke, at Derbyshire Assizes, and came before the Queen's Bench in banc on a rule to show cause why a new trial should not be granted, on the ground of a misdirection in regard to the principle upon which the damages should have been assessed. In granting the new trial, the doctrine is held that the jury, in estimating damages under that statute, "are to be confined to injuries, of which a pecuniary estimate can be made, and cannot take into consideration the mental suffering occasioned to the survivors by the death," and that nothing may be allowed as *solatium*, that being incapable of a pecuniary estimate, nor for the sufferings of the injured party. The difficulty of estimating the value of the life, and the consequent damage to the survivors in the loss of it, is conceded in the case, but the reasoning of the learned judge is forcible in illustrating the greater difficulty which would have to be encountered in estimating damages for what cannot be measured by any pecuniary standard, such as grief, loss of society, and the thousand nameless things which make up the estimate in which the deceased may have been held by the survivors, entitled to damage

under the law. And hence the conclusion, that the provision giving damages for the death was only such as could be tested by a pecuniary estimate, not speculative or fanciful. "The measure of damages," said the learned judge, "is not the loss or suffering of the deceased, but the injury resulting from his death to his family." Our statute, although differing, in the absence of details from the British statute is a provision for compensating precisely the same sort of injury, the damage occasioned to the survivor by the death of the deceased, and hence we may avail ourselves of the light shed upon the subject by the learned court in the case cited. In England, under this construction of their statutes, damages seldom exceed one or two hundred pounds sterling. One great merit in the rule and what undoubtedly was the legislative intent, there as with us, is that it is a rule of equality, compensating the rich and poor, the refined and cultivated, and those less so, by the simple standard of pecuniary loss.

The case of the *Pennsylvania Railroad Co.* vs. *M'Closkey's administrators*, 11 Harris 526, while it adheres to the rule of giving damages only upon such bases as are susceptible of a pecuniary estimate, seems to regard the value of the life lost as the basis of the estimate, rather than the injury resulting from it to the survivor entitled to sue. This conclusion flowed from the form of, and parties to the action, and naturally led to the result. It was a suit by the personal representatives for the benefit of the estate. Treated in this light, and as the plaintiffs, the administrators, were not damaged by the death, but were recovering for the estate, the only estimate, it seems to me, that could be made, was of the value of the life. The wrong done to it survived by virtue of the statute, to the estate, and gave the personal representatives their right of recovery co-extensively with its value. But for some reason, a wise one of course, this law was in 1855 altered, and the right to sue was conferred on parents for the loss of children, and children for parents, and reciprocally between husband and wife. This was a new and independent right, given by positive law, not cast by survivorship as for an injury to the decedent. It is for the wrong done to them. In this view of the law, we think the rule which should have been

observed in this case, differs from that in the *Pennsylvania Railroad Co.* vs. *M'Closkey's administrators*, and more resembles the case of a father suing for injury to his child. In the case of the *Pennsylvania Railroad Co.* vs. *Kelly*, 7 Casey, 372, the rule of damages in such a case was considered; and in delivering the opinion of the court, Mr. Justice WOODWARD says, "the damages must be compensatory merely, and that compensation must have regard to the plaintiff's loss of his services, and to the expense of nursing and medical treatment." "The father was entitled to the services of his child during minority, and by just so much as this injury impaired the value of this right, was he entitled to compensatory damages," and it was added "that it was proper for the jury to understand, that the suffering endured by the boy, and the disfiguration of his form, and whatever was merely personal to him, should not enter into the father's damages, because for them the son would have a right of action." This is a rule on a very kindred subject, and is scarcely distinguishable from cases like the present, except in extent of injury, and is in essence the principle of the cases already cited.

From the authorities and reasons given, the jury, instead of the unrestrained license given them in the charge, in the assessment of damages, should have been instructed that if the plaintiffs were entitled to recover, it was for the damage done in producing the death of their son, and this was to be estimated by the pecuniary value to them of his services during his minority, together with expenses of care and attention to the deceased, arising out of the injury, funeral expenses, and medical services, if any. This is the only pecuniary damage done to them, and this the law allows them to recover, if entitled on the facts to recover at all. This excludes damages for the suffering of the deceased, which was personal to himself and did not survive, as well as for solace, which are incapable of appreciation so as to be compensated. No money could be the measure of the affliction, no road great or small, but would fall beneath the weight of such a rule if applied, and for an injury happening by a mere oversight, amounting of course to negligence by some agent in the transit of the cars, it would be a severe penalty to visit the company with extravagant and exterminating damages.

But they should be held to a strict accountability to the extent that a fair interpretation of the statute will allow. In making the estimate of the value of the life, and consequent damage by the death, much is still left to the sound discretion of the jury. Whatever is susceptible of a pecuniary estimate is included within it, and what we have seen was not to be included must be excluded. We are speaking only of cases of death by negligence, unaccompanied by wantonness, violence or gross negligence, evincive of moral turpitude. In such cases no doubt but merely compensatory damages may be exceeded. It is not intended to vary the rule on this subject existing in case of other personal wrongs, but leave it with such attendant circumstances, to the sound discretion of courts and juries.

The thirteenth assignment of error is to the rejection of Shattuck as a witness. We are not convinced that there was error in this ruling, nor is it material to decide the matter, for, as the case goes back for a re-trial, the company will perhaps think it their duty to avoid an exception on this ground by executing a release to him.

The other assignments of error not noticed are not sustained, but for the reasons given, this judgment must be reversed.

Judgment reversed and *venire de novo* awarded.

In the Supreme Court of Texas—Tyler Term, 1858.

JOSEPH HANCOCK ET AL., APPELLANTS *vs.* WM. B. BUTLER, APPELLEE.

A gift of slaves to one "for the term of his natural life, and at his death to his lawful issue forever," vests in him a life estate only.

The following opinion[1] was delivered by

ROBERTS, J.—Appellants claim the slaves in controversy as the children of Joseph Hancock, deceased, under the deed of their grandfather, John Hancock, which reads as follows:

"SOUTH CAROLINA,
Edgefield District.

Know all men by these presents that I, John Hancock, of the State and District aforesaid, for and in consideration of the love and natural affection I bear unto and

[1] This opinion will appear in the 21st volume of Texas Reports.

for my beloved son Joseph Hancock, and for his better support and future convenience, have this day given the following property to the said Joseph Hancock, in the following manner, viz: I give unto said Joseph Hancock two negroes, viz: Jerry, a boy, dark complexion, about eighteen years old, and one girl, Ann, dark complexion, about seven years of age, *and for the term of his natural life, and at his death, to his lawful issue forever.*"

[Then follows a full warranty "*unto said Joseph Hancock and his lawful issue.*"]

Under this deed, appellants claim as purchasers from John Hancock; and their right so to do depends upon whether or not Joseph Hancock took a life estate only in the slaves—and that is the question in this case.

What did the grantor *intend* by the terms of his deed? Was that intention lawful? These are the leading inquiries to be made. The governing rule is—that every part of the instrument should be harmonized, and given effect to, if it can be done. If that cannot be done, and it is found that the deed contains inherent conflict of intentions—*then* the main intention, the object of the grant being considered, shall prevail. In either event the result arrived at must be a lawful one. See *Rules in Sheppard's Touch.*, 83, 84, and 85. In arriving at the intention of the grantor, what he had a right to do, and what he did not have a right to do, should be taken into consideration: for it is to be presumed that he knew his rights, unless we find something in the deed which leads to a different conclusion. He had a right to give his son the property absolutely, either with or without reference to his issue. He had a right to give to his son Joseph a life estate only, and connect with it a gift of the absolute property, to take effect at the time of Joseph's death, to *persons* then in being, answering the description of Joseph's issue.

He had no right to create a perpetuity, by which he would tie up the property from alienation longer than a life or lives in being, and twenty-one years.

He had no right to entail the property by giving it to Joseph and his issue, to take in a line of succession after one another contrary, to the general laws of descent and distribution.

He had no right (terms are used applicable to real estate, so as to convey the idea,) to reduce the estate conferred on Joseph to a life estate, if in the same deed he made the issue of Joseph derive an estate in fee or fee-tail from and through Joseph as his heirs by descent.

Now if this deed, or its parts, are equally capable of two constructions—one, consistent with his having intended to do that which it was lawful for him to do,—and one, which is consistent with his having intended to do that which it was unlawful for him to do—the former will be adopted.

The part of the deed, which expressly indicates the interest which Joseph Hancock is intended to take, is plain and not even capable of being made dubious—"I give unto Joseph Hancock (the slaves) for the term of his natural life." If the deed went no further, or if the full property in the slaves had been given, after that, by the same or another deed, over to the issue of some one else, there could be no doubt that Joseph only took a life estate.

It is contended by the counsel for appellee, in an elaborate argument that this express intention is overborne, and a greater interest than a life estate was conferred on Joseph Hancock by the mode in which the interest in the property is bestowed on the issue, viz: "at his death to his issue forever;" that, by the use of these words in the deed, he has done (whatever he might have intended) some one or all of the three things above designated which he had no right to do—and that therefore the only legal result which can flow from the deed, so as to give it effect at all, is to cast upon Joseph Hancock the absolute property in the slaves.

To effect this, the rule in *Shelley's case* is mainly relied on. That is stated to be—"when a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and, in the same instrument, there is a limitation, by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, *to his heirs, or heirs of his body*, as a class of persons to take in succession from generation to generation,—the limitation to the heirs entitles the ancestor to the whole estate," 4 Kent, 215. This result would follow,

although the deed might express that the first taker should have a life estate only. *It is founded on the use of the technical words, "heirs," or "heirs of his body," in the deed, or the will.*

The rule in *Shelley's case* is said to be a rule of law. It is really an organic rule, entering into the creation of the estate of inheritance. The whole must embrace all its parts. The existence of the whole being established, or taken for granted, it cannot be true that a part of the whole is wanting—that is, if it takes four sides to complete a mansion, its completion being admitted, by a law in physics it cannot be true that the mansion has *three sides only.* In that sense it is a rule of law.

Without attempting a severely accurate definition, but for purposes of illustration, it may be said—that the law does not permit a grantor to create an *inheritable* estate—divide it up into sections of certain or uncertain periods—and fasten a section thereof upon the first taker with the reduced dimensions of a life estate only. That is in violation of the rule by which an inheritable estate is created. For if a life estate only be clearly granted to the first taker, (as Joseph Hancock in this case) from all the terms of the deed taken together, then his heirs cannot inherit the estate from him, and it cannot be truly said that he takes an inheritable estate. The fact, on the other hand, of its being an estate descending to his heirs in succession, is inconsistent with the fact of the first taker's having a life estate only, and, therefore, if it appears, from the deed, that it is by *descent* from the first taker that certain persons, *as his heirs,* must derive their title,—then that forces back on him (that from which alone such a result could flow) an inheritable estate with all its attributes; although other parts of the deed might indicate an effort to confer on the first taker a life estate only.

We are brought to the point then—do the terms of the deed "and, at his death, to his lawful issue forever," standing in the connection they do, give the property to *persons* in being at the time of Joseph's death, answering the *description* of Joseph's issue, they taking as purchasers? or do they give the property to "the

heirs of his body," as a class of persons to take in succession from generation to generation, which would be by inheritance?

The word issue being the leading feature of this sentence, upon which all the rest concentrates, it is important to fix some definite meaning to it. It may mean descendants living at the death of the first taker, or descendants through all future time so long as there are any; it may mean "heirs of the body," or it may mean children. The first point, to be settled, is into whose hands will the property first go, after the death of Joseph Hancock, and in what proportions, so far as can be gathered from the words lawful issue as they stand in the deed.

It is said, the word issue, when not restrained by the context, is co-extensive and synonymous with descendants, comprehending objects of every degree. And here the distribution is *per capita*, and not *per stirpes*. This is supported by four cases. 2 Jarman on Wills, 25, 26; 3 Vesey, 257; applying both to personal and real estate, and it is said there is no authority to the contrary. The cases are, *Davenport* vs. *Hanbury; Freeman* vs. *Pasley; Cooke* vs. *Cooke; Leigh* vs. *Norbury*. The last case was a deed of settlement of personal property for A. during his life, and after his decease, for his lawful issue. 2 Jarm. Wills, 25.

The general rules of property, respecting legal and trust estates being the same, (Fearne, 144, 132, 133, 136;) this case, if admitted in all its bearings, would be a strong case in favor of Joseph Hancock having taken a life estate. For, if at his death all his descendants were to take *per capita*, they would not be either the heirs of his body, or his distributees; that is, not necessarily or usually so. That would present the case of a child and grandchild, and even great-grand-child, all living and each taking an equal part, which would of course be variant from any known laws of inheritance, or distribution. And where those that are to take are not the same as those who would be heirs, or heirs of the body, a life estate is created, and the rule does not apply. Fearne 148, *Cheek* vs. *Day;* id. *Archers' case.*

That interpretation of the word *issue* is founded on its literal meaning, standing by itself. But how can the word be thus isolated

when it is placed in a deed? If connected with no words that explain or qualify it, it stands in connection with the general objects of the deed. Valuable property is given—it is given to some person; that person is pointed out by a word capable of being understood to relate to several different persons, or classes of persons. To arrive at what person was intended, it is but fair to ascertain to whom men have generally given under such circumstances, who have specially designated the objects of their gift.

It is presumed it would be difficult to find one case where a man had expressly given his property to all his descendants, to take per capita—children, grand-children, great-grand-children, &c. The general sense of the American mind, as exhibited in deeds, wills, and in statutes of descent and distribution, is that it is proper to give property to children, grand-children, &c., they taking *per stirpes*. So we may well presume, in this case, that such persons were meant. They would be the same persons usually designated by the words "heirs of the body." It does not follow, however, that this sentence, with the word issue in it, means the same thing in this deed as it would have meant if "heirs of the body" had been inserted in its stead. For the words "heirs," and "heirs of the body," in England, where both estates in fee and in fee tail exist, have a fixed legal meaning. They are the appropriate and necessary words to create those estates. A legal implication arises from them, when used in a deed, over and above their import to designate particular persons; which is, that the estate is to pass from person to person through succeeding generations, in regular succession. So that it may be said they have a double import—one, an import of designation; the other, an import of inheritance. Strictly speaking, they never did have this "import of inheritance" with reference to personal property, for that could not be *inherited*.

In the states that have inhibited entailment, the words "heirs of the body" are not strictly technical, because they are not appropriate words to create any estate recognized by law. *Jarvis et al.* vs. *Wyatt*, 4 Hawks' N. C. Rep. 227. In this state it is not even necessary to use the word "heirs," to create an estate in fee. From their indiscriminate use, however, with a recognized meaning

derived from the common law, they would generally be understood to bear their full import in reference to both species of property. *Choice* vs. *Marshall*, 1 Kelly, 97; *Kay* vs. *Connor*, 8 Humphries, 63.

If a deed or will contain a gift, as in one of the cases just cited, of slaves "to M. F. during her natural life, and to the heirs of her body forever," this is tantamount to the expression, "to M. F., during her natural life, and such descendants as the law points out to inherit her estate, and who shall hereby take the said slaves by inheritance from M. F." Here, at once, is presented, by the use of the technical words "heirs of the body," (when fully interpreted and both of its imports delineated,) a conflict between the first proposition, that M. F. shall take a life estate, and the second proposition, that the descendants shall take by *inheritance* from M. F. No sort of construction can reconcile them. It would not do to say, the words "heirs of the body" shall be understood in their "import of designation" only, in which case there would not be a conflict. That would not be reconciliation—it would be rejection; it would reject a part, and the most important part, of the meaning of the words fixed by law. If one must be rejected, why reject the first proposition rather than the second? Because it will confer the greater estate on M. F. The courts will construe a deed to confer the greatest estate on the grantee that the terms of the grant will permit. For instance, if an estate be granted without any limitation to heirs, and without any period of enjoyment being specified, it will be taken that a freehold for the life of the grantee has been conveyed to him. 2 Blackstone, 94. By rejecting the first proposition, and retaining the second, an estate in fee tail, instead of a life estate, is conferred upon the first taker, and his heirs take by inheritance. *Shelley's Case*, and cases cited in 4 Kent, 214.

Though against the general rule, "heirs of the body" may be, and often have been used with their "import of designation." The English cases in which the general rule is discussed are too numerous to cite. Chancellor Kent, after a review of them, says, (4 vol. 228,) "all the modern cases contain one uniform language, and declare that the words 'heirs of the body,' whether in deeds or wills, are construed as words of limitation, unless it clearly and

unequivocally appears that they were used to designate certain individuals answering the description of heirs at the death of the party." It will be found, however, that in some of the states the rule has been abolished by statute; (Massachusetts, New York, Connecticut, and perhaps others) and although it has been generally recognized, the current of decisions, in the American states where it has not been abolished, bears strongly against enforcing it, unless in cases coming strictly under the rule. They more readily seize hold of any qualifying or superadded words, varying the sense of the technical terms, in order to make them words of designation, than is done in England. English cases of *Jesson* vs. *Wright* and *Atkinson* vs. *Featherston*, given in 2 Jarman on Wills, 285. American cases: *Prescott* vs. *Prescott's Heirs*, 10 B. Monroe, 56; *Kemp* vs. *Daniel*, 8 Geo. 385; and *Newell* vs. *Newell et al.*, 9 Sm. & Marsh. 56. See, also, 3 Iredell, 200, and 4 Hawks' N. C. 227, opinion by Judge Henderson; 9 Ala. Rep. 719, opinion by Ch. J. Collier.

This difference is to be attributed somewhat to the political connections of the subject in each country. England, originally resting on its feudal basis, fostered the strength of the parts, and therefrom anticipated the strength of the whole, by an accumulation and perpetuation of property in families. The crown was not in this policy, nor was commerce. The judges, receiving their power from the crown, waged a perpetual war against it. Hence, then, the construction of the statute *de donis*—their restriction of perpetuities—and the enforcing and expanding the rule in Shelley's case with continually increasing rigidity. In the American states, perpetuities, entailments, and the right of primogeniture were generally prohibited by their written constitutions; and the antagonism of classes never having existed here, the public mind was at ease on the subject of the encroachments of the power of property. Hence our decisions have not always kept pace with the English decisions in disregarding the qualifying words which formerly, in their own courts, took the case out of the rule. See the opinion of Chief Justice Marshall, 10 B. Monroe, 56, in which he adheres to for-

mer decisions, and declines to follow the then late English case of *Jesson* vs. *Wright*.

These remarks are made, not in a spirit of opposition to the rule, for it is believed that the rule should be enforced; because it is the law, and because it is founded in sound policy. It must be observed and followed whenever, and as long as the words "heirs of the body" preserve their double import, both of designation and inheritance. We are now prepared to enter on the question—does the word *issue, ex vi termini* possess the double import which is embodied in the words *heirs of the body?* Investigation will show that it does not. From its generally comprehending the same class of persons that are the heirs of the body, it is frequently used in that sense, and will be so construed to effect the object of the deed or will.

In the case of *Cooper* vs. *Collins*, Lord Kenyon observed "that issue was either a word of purchase or of limitation, as would best answer the intention of the devisor, though in case of a deed it is universally taken as a word of purchase." 1 Durn. & East, 299. So in regard to the word 'children,' Lord Hardwicke remarked, "it must be allowed that children, in their natural import, are words of purchase, and not of limitation, unless it is to comply with the intention of the testator, *where the words cannot take effect any other way.*" 2 Jar. 226. The same may be said of the words, "child," "son" and "daughter." Gould, J., said that the word issue "comprehends the whole generation, as well as the words heirs of the body; and, in his judgment, were more properly words of limitation than words of purchase." Lord Talbot said that "issue is not, even in legal construction, so appropriate a word of limitation as the word heirs." Fearne, 149. In *Backhouse* vs. *Wells*, it is said that "it is to be remembered that the word issue itself, even unattended with any engrafted words of limitation, is often a word of purchase, where the word heirs is not." Fearne, 153. In *King* vs. *Burchill*, it was said by Lord Keefe Hewley, "that the word issue was naturally a word of purchase; that the intent was to be collected from the whole will." In the case of *Knight* vs. *Ellis*, Lord Thurlow said, "the word issue, used in a

will, certainly is considered as creating an estate tail, because the context puts on the word an import which it has not naturally; but in a feoffment it is not a word of limitation." Fearne, 490. See also, 4 Ves. Jr. 794; 5 Ves. Jr. 259; 1 Ves. Jr. 142, and notes to 151, 152.

But one out of the many American cases will be referred to. In the case of *Horne* vs. *Lyeth*, decided in Maryland, cited with marked approbation by Chancellor Kent, it is said by Ch. J. Dorsey, "the word issue in grants was exclusively a word of purchase." 4 Kent, 230.

The word issue may be definite or indefinite: definite, when it means all descendants of one generation; indefinite, when it means all descendants of a series of generations; and when the context puts on the word "an import which it has not naturally," by substituting it for the words "heirs of the body," it bears neither of these two meanings, but is a constrained compound of parts of both.

The word issue, used in its natural sense, whether definite or indefinite, points to the same persons in all countries. "Heirs of the body" points to different persons in different countries, just according to the variance in their laws of descent. The words, children, child, son, daughter, have not the double signification of definite and indefinite import possessed by the word issue, and therefore cannot so readily be pressed into the service of and substituted for heirs of the body, as the word issue. And that is all the difference between them. None of them have that artificial signification fixed by law and variant with the laws of each country, as that attaching to "heirs of the body." Their substitution is the work of construction, founded on presumed intention, arising out of the whole context of the deed or will; not in contradiction to and violation of their terms. 2 Jarman on Wills, 240 and note "f" and 241.

On this subject, Lord Thurlow says, in the case of *Knight* vs. *Ellis*, given in Fearne, 490, note: "Now what do the cases come to? A man devises by his will to A. for life; there being plainly an intent only for life given; if that were all, the disposition would end there as to A., and any other would be effectual after his death.

The testator then gives the same fund over to B., after a failure of issue of A. What is the court to do? It is clear a life interest only is given to A. It is clear that there is no benefit given to B. while there is any issue of A. The consequence is, that, as no interest springs to B., and no express estate is given after the death of A., the intermediate interest would be undisposed of, unless A. were considered as taking for the benefit of his issue as well as himself; and as the words in this case are capable of such amplification, the court naturally *implies* an *intention* in the testator that A. should so take, that the property might be transmissible through him to his issue, and he was therefore considered as taking an estate tail, which would descend on his issue. Now an estate in chattels is not transmissible to the issue in the same manner as real estate, nor capable of any kind of descent; and therefore an estate in chattels, so given from the necessity of the thing, gives the whole interest to the first taker; but if the testator, without leaving it to the necessary implication, *gives the fund expressly to the issue*, they are not driven to the former rule, but the issue may take as purchasers; and then there is an end of the enlargement, of any kind, of the estate of the tenant for life; for *another estate is given after his death*, to other persons who are to take by purchase; it no longer rests on conjecture." It may be added, that there is no room left for construction. The life estate is *expressly* given to the first taker; the absolute property is *expressly* given to his issue; they stand in harmony together; there is no inherent import of inheritance in the word issue, standing alone, which would make it necessary to reject a part of the deed, to wit: that part giving expressly the life estate, as would be the case if "heirs of the body" alone were so used.

The rule, then, that courts will confer the greatest estate on the grantee that the terms of the grant will permit, must necessarily be subordinate to the rule "that every part of the deed should be "harmonized and given effect to, if it can be done."

If, then, in this gift to Joseph Hancock, "*for the term of his natural life, and at his death to his lawful issue forever*," the word issue can be read as a designation of persons, to take at his

death, every word and sentence of the deed will be given effect to, and both Joseph, and those persons after him, will take as purchasers.

To *presume* it to have been used in another sense, is to erase out of the deed one whole sentence plainly expressed, to wit, "for the term of his natural life," and to make the donor do that which is in violation of law, in making an estate tail; which will not be readily presumed, (see 15 Geo. R. 145–6,) and is in direct violation of the manifest intention of the donor. And all this upon a *presumption* that issue is used in a sense "which it has not naturally." *Moss* vs. *Shelden*, 3 Watts & S. 160.

The word *forever* is the only part of the deed which could give any plausibility to the view, that issue was used as a word of limitation. But, upon weighing all the words of both parts of the gift, it will be seen that it relates to the property given, and not to the persons taking; as the amount of interest given to Joseph, to wit, a life estate, was expressed by words of time, viz: "for the term of his natural life," so the amount of interest given to the issue, to wit, the absolute property, was also expressed by a word of time, viz: "forever."

Were it dubious, whether *forever* related to the property or the persons, the rules we have laid down would favor the construction that has been given, as it would best give effect to all the words of the deed, and reject none. Again, if a different view be taken, "forever" will come in conflict with the words "at his death." Apply "forever" to the persons, and the gift extends itself to them from generation to generation throughout all time, (and creates an estate tail, if such a thing were lawful,) and that would be wholly in conflict with the idea expressed in the deed, that the gift is to exhaust itself on persons *at his death.* The words *at his death*, have always been held to be extremely pertinent and of controlling force to indicate the persons to take as purchasers. (See case of *Warman* vs. *Seaman*, cited in Fearne, 495; also *Payne* vs. *Stratton*, id. 493, 2 Jarman, 240, and note, id. 360; see also *Kent's Rule*, 4 Kent, 228; see Statute of 1837, in England, making other words to be construed *at his death*, 2 Jarman, 296.) This applies equally in gifts directly to issue, as well as in

limitations over, after failure of issue, at the death of the first taker—which is a gift to the issue by implication. Besides cases above, see *Leigh* vs. *Norbury*, 13 Ves. Jr. 338; 9 Ala. R. 719, opinion by Ch. J. Collier; 3 Iredell, 200; 4 Hawk, 227; 8 Geo. 385; *Kemp* vs. *Daniel*, 6 Serg. & Rawle, 28; 2 id. 59; 4 Iredell, 93; Dudley, 207; 10 B. Monroe, 188; 16 Johnson, 381; 10 Geo. 495; *Carlton* vs. *Price*, 9 Ala. 135; *Dun* vs. *Davis*, 4 Monroe, 223.

If these principles be established, the issue of Joseph Hancock took as purchasers at his death.

An analogous authority in support of the whole case is *Leigh* vs. *Norbury*, (in 1807,) 13 Ves. Jr. 338, which is a case of marriage settlement relative to personal property, and which was a settlement to "H. W. during his natural life, and from and immediately after his decease (subject to an appointment which was never made, and in default thereof,) to his lawful issue." H. W. had made a will before he made this settlement. It was held by Sir W. Grant that all his issue took under the settlement, notwithstanding the will, which, it is submitted, could not have been the case if the right to the property had returned to him, or rather had never left him, by force of the words "lawful issue" in the deed.

The English case relied on by appellee's counsel, (*Roe & Doom* vs. *Grew*, 2 Jarm. 245,) is a devise to G. for his natural life, and *after his decease* to the use of male issue, and for want of such, over, &c. Held, that it created an estate tail, on the ground that as long as he had male issue the estate should not go over. The strongest case found is *Attorney General* vs. *Bright*, 2 Jar. 353, where the gift was to A. during her life and then to her issue, but in case of her death without issue, then over, &c. Held, that the property vested in A. upon the same ground as in the preceding case. It is evident that in neither of these cases were the words used construed to mean failure of issue *at his death*. Mr. Fearne 495) says: "A limitation of a term to A. and to her issue, it seems, vests the whole in A., if the devise rests there; though the addition of the subsequent words—and if A. die, and leave no issue—Lord Hardwicke said, related to any child living at A's death; and consequently the word issue there was considered as a

word of purchase." The great controversy has been, not the *effect* of the words "at his death," in this connection, but what words were tantamount thereto. (2 Jarm. 240.) And to obviate the difficulty, a declaratory statute was enacted in England in 1837, (2 Jar. 296.) Before this statute, it had got to be the case that few expressions could be framed that would be held to be of similar import to that conveyed by "at the death." And it must have been under that view that the case of *Kingsland* vs. *Rapelye and wife*, (3 Edwards' Ch. R. 1, N. Y.) was decided. The words there, were "to D. T. E. during the term of her natural life, and *upon her decease* unto the lawful issue of D. T. E., his, her and their heirs, &c., forever, equally to be divided among them, share and share alike." The Vice Chanceller held that the property vested in the first taker absolutely. His opinion rests upon *King* vs. *Melling*, 1 Ventris, 225, and *Rose* vs. *Grew*, 2 Wils. 222, to establish that the words "lawful issue" in that will, stood in the place and had the same force as the words "heirs of the body." In both of those cases the words "after his decease," were used, and no reference is made to the difference that might exist between such words and the words used in the will before him, viz: "upon her decease," and they are therefore treated as amounting to the same. In that point of view, then, this case stands upon the same ground as the cases already disposed of, (one of them being the same.) Further, his opinion rests upon *Mog* vs. *Mog*, 1 Mer. 654, and *Jesson* vs. *Wright*, 2 Bligh. R. 1, to reject the superadded words "*to be equally divided among them, share and share alike*," in the will before him, as furnishing no reliable indication that the testator had in his mind a *designation of persons* when he used the words lawful issue. The case of *Mog* vs. *Mog*, has the same words already commented on—"after the decease" of such child or children. The case of *Jesson* vs. *Wright* not only had the words *after his decease*, but also "heirs of his body" in the will, upon the force of which the words "share and share alike," were rejected as inconsistent with the legal effect of the technical words, heirs of the body. It is sufficient, without further notice of the four cases upon which that decision is based, to say that none of them conflict with this case, in which the words used are "at his death."

A case very strongly in point, in favor of the view we take is *Carlton* vs. *Price*, 10 Geo. R. 496. The words in the will are "to C. during his natural life and at his death to the lawfully begotten heirs of his body, &c.; if C. shall die without an heir, then the negroes to be set free *at his death.*" Warner, J., in delivering the opinion, lays great stress upon the time when the bequest should be consummated—at his death—in determining that even "heirs of his body" were used to designate persons to take as purchasers. The same is decided in *Kemp* vs. *Daniel*, 8 Geo. R. 385. A case strikingly in contrast with the case from 3 Edwards, above cited, is 9 Ala. R. 719, in which the words are "to M. F. during her natural life, and *at her death* to the lawful issue of her body that may then be living, share and share alike, &c., forever." The Chief Justice in delivering the opinion, held that the issue took by purchase, and said it is manifest that the estate should vest in her heirs *at her death.*

But one more case will be stated, which is *Newell* vs. *Newell et al.*, 9 Sme. & Mar. 56, which is made on a will executed in the State of South Carolina, (where this deed was made,) and based on a full review of the decisions of that State. The words are, "I give and bequeath to my daughter, Mary, a negro, &c., to her and the heirs of her body—during her life. Should she die without an heir, her part to go to her brothers." Justice Clayton held that the limitation over to her brothers was not too remote, and it follows as a consequence of this that Mary took only a life estate. To support this case upon principle, to the words "*should die without an heir*," must be added by implication *living at the time* of her death. As strong cases as this are quoted from South Carolina, the last and most extreme one of which was sustained by a divided court only. But the one upon which they mainly rest their decision, is very pertinent to this case in one respect; the words of which are "to M. and her heirs," and in another part of the will "if one or more of my children should die without issue, then his, her, or their part shall be equally divided between the *surviving* brethren." Upon which Justice Clayton remarks: "No difference is perceived between this and the present, unless in the use of the word *surviving*,

as indicating the *period* at which the limitation was *to take effect.* In this case the property is to go to the brothers; the intention is equally manifest, as if the word surviving had been inserted."

Other cases may be cited showing that not only the time at which the gift is to take effect, but also superadded words of qualification may be considered in determining whether or not the word "heirs of the body" are used as a designation of persons to take as purchasers, especially in cases concerning personal property. (10 B. Monroe, 56, *Prescott* vs. *Prescott's heirs; Swain* vs. *Roscoe*, 3 Iredell, 200; *Jarvis, et al.* vs. *Wyatt*, 4 Hawk, 227; 12 Ala. Rep. 135, in *Dunn et al.* vs. *Davis.*) These American cases are brought forward, not for indiscriminate adoption, but to make manifest, by the current of decisions, that the taking effect of the gift at the death of the first taker, is an important fact in favor of the persons being designated as purchasers, even where the technical words "heirs of the body," are used, and more controlling, of course, when the word issue is used. The case of *Polk et al.* vs. *Farris*, (9 Yerg. 210,) cited for appellee, does not stand in the way of this decision. Its application to this case is upon the assumption, not admitted, that lawful issue in this deed, means the same as though it were written "heirs of the body."

The reasons, then, that this case does not come under the rule in Shelly's case, are—

1st. The technical words on which the rule is founded—"heirs," or "heirs of the body"—are not used in the deed.

2d. The word issue, (without straining it out of its appropriate signification,) which *is* used, may be understood in a sense not conflicting with that part of the deed which gives Joseph Hancock a life estate only, and to give effect to the whole, it will be taken to have been used in that sense.

3d. The gift to the issue at the *death* of Joseph, is strongly indicative that the word issue was used in the sense of designation of persons then to take the absolute property, which would make them take as purchasers.

What is decided now, is—that the words "lawful issue," as they stand in this deed, are words of purchase, and not of limitation. No other question having been made, none other will be decided.